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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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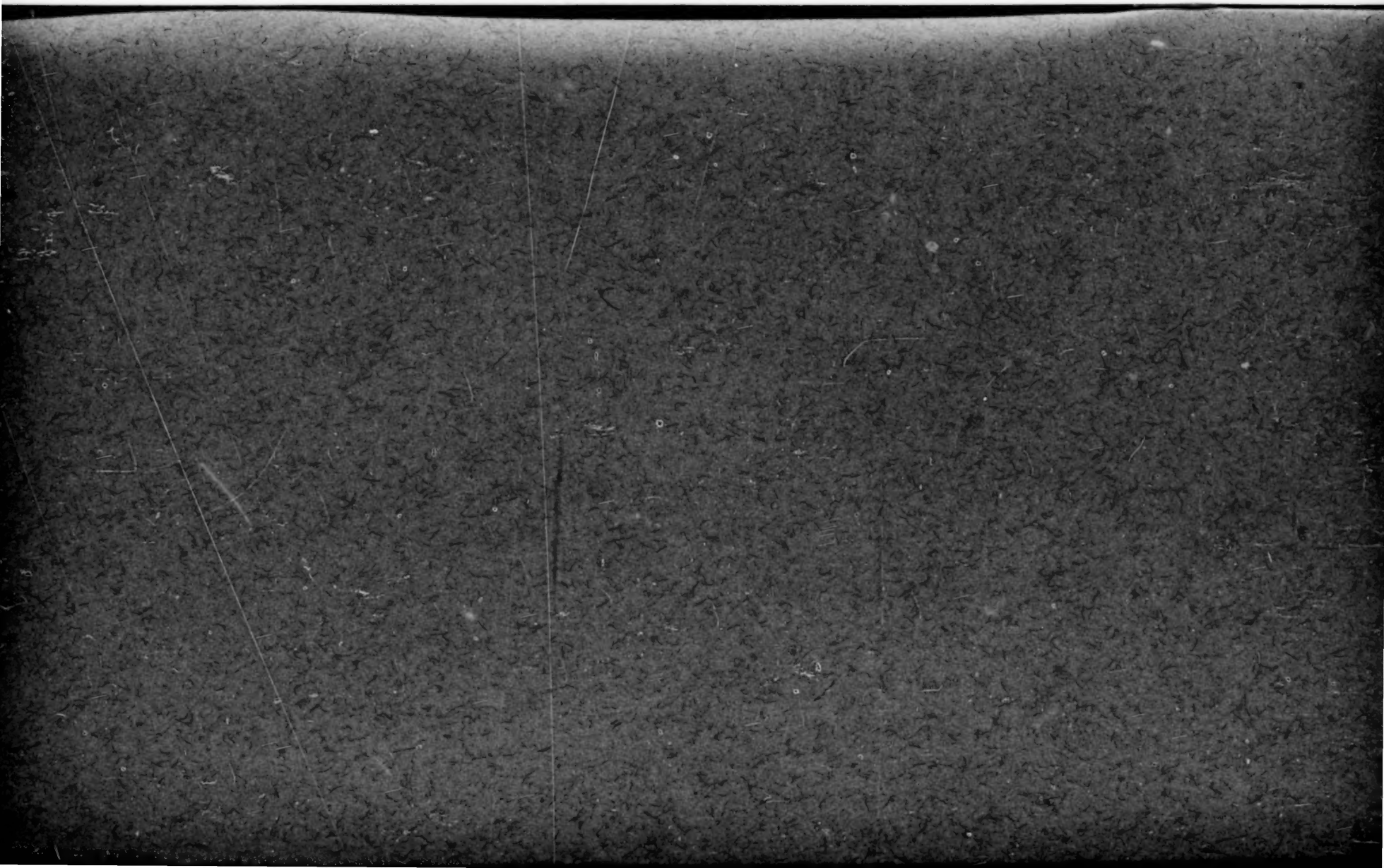

QUESTION PRESENTED

Whether the United States' navigational servitude, which permits the federal government to improve navigable waters free from claims of just compensation, bars the Cherokee Nation's claim that construction of the McClellan-Kerr Arkansas River Navigation Project has resulted in compensable damage to instream tribal property interests.

PARTIES TO THE PROCEEDING

The petitioner is the United States of America. The respondent is the Cherokee Nation of Oklahoma.

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CHEROKEE NATION OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 782 F.2d 871. The opinion of the district court (App., *infra*, 25a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 29a) was entered on January 23, 1986. On April 22, 1986, Circuit Justice White extended the time for filing a petition for certiorari to and including May 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution provides in relevant part:

The Congress shall have Power * * *

* * * * *

[3] To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes * * *.

The Fifth Amendment provides in relevant part:

[N]or shall private property be taken for public use, without just compensation.

STATEMENT

The McClellan-Kerr Arkansas River Navigation Project is an extensive congressionally-authorized navigational improvement program that links the Southern Plains states with the Nation's inland waterway system. The Cherokee Nation of Oklahoma, which holds title to a portion of the Arkansas River's bed, initiated this suit in 1983 claiming that construction and operation of the project has effected a compensable taking of the Tribe's instream property interests. The United States responded that the government's firmly established power under the Commerce Clause to improve navigable waters free from suits demanding compensation for resulting instream property damage—the so-called "navigational servitude"—barred the Cherokee Nation's takings claim. The district court disagreed, holding that the United States had failed to preserve its navigational servitude in the relevant Indian treaties and patents (App., *infra*, 25a-28a). A divided court of appeals affirmed on different grounds, holding that the Cherokee Nation is subject to the navigational servitude, but the Tribe nonetheless "ha[s] a right to compensation for any consequent loss of property or diminution of value" to tribal interests resulting from the navigation project (*id.* at 16a).

1. The McClellan-Kerr Project, one of the Nation's largest and most important navigational improvement undertakings, provides water transportation essential to

the commerce of the Southern Plains region of the United States. The project represents the culmination of congressional efforts, begun early in the nineteenth century, to realize the full commercial potential of the Arkansas River, our country's fifth longest and thirteenth largest waterway.[1]

Congress initiated the McClellan-Kerr Project in 1935 by requesting the Army Corps of Engineers to investigate the prospects for a comprehensive program to improve the navigable reaches of the Arkansas River. Act of Aug. 30, 1935, ch. 831, 49 Stat. 1028, 1045. The Corps responded in 1945, submitting a multi-purpose plan that would provide navigational, flood control, and hydropower benefits. H.R. Doc. 758, 79th Cong., 2d Sess. (1946). Navigation was the centerpiece of the plan. The Corps would develop and maintain a nine-foot deep, 480-mile channel in the Arkansas River from its mouth at the Mississippi River to Catoosa, Oklahoma. In addition, the Corps would construct a series of locks and canals providing 420 feet of lift between the Mississippi River and Catoosa (*id.* at 59-66). The Corps envisioned that Oklahoma, Colorado, New Mexico, Kansas, Texas, Missouri, and Arkansas would gain access to water transportation, either directly or through connections with highways, pipelines, and rail lines, increasing commerce along the Arkansas River from 600,000 tons per year to more than 9 million tons per year (*id.* at 47-49, 54-55).

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[1] Congress first authorized navigational improvements on the Arkansas River in 1832. See Act of July 3, 1832, ch. 153, 4 Stat. 551, 553. These improvements continued through the twentieth century. See, *e.g.*, S. Exec. Doc. 26, 33d Cong., 1st Sess. (1854); H.R. Exec. Doc. 295, 41st Cong., 2d Sess. 33 (1870); S. Misc. Doc. 22, 44th Cong., 1st Sess. (1876); H.R. Exec. Doc. 94, 45th Cong., 3d Sess. 8 (1879); Act of June 13, 1902, ch. 1079, 32 Stat. 331, 357; Act. of Mar. 2, 1907, ch. 2509, 34 Stat. 1073, 1092.

Congress approved the McClellan-Kerr Project in 1946. Act of July 24, 1946, ch. 595, 60 Stat. 634, 635-636. Construction commenced in 1957, and was essentially complete by 1971. As a result of this project, the residents of the Southern Plains region have enjoyed enhanced commercial, recreational, and hydropower benefits from the Arkansas River.

2. The Cherokee Nation's claim that the McClellan-Kerr Project has resulted in a Fifth Amendment taking of its instream property interests is premised upon the Tribe's recently established title to a portion of the Arkansas River's bed.

In 1966, the Cherokee, Chickasaw, and Choctaw Tribes initiated a lawsuit to establish Indian ownership of the riverbed from the confluence of the Arkansas and Grand Rivers to the Arkansas-Oklahoma border. Prior to this lawsuit, it was generally assumed that the State of Oklahoma, upon statehood, received title under the Equal Footing Doctrine to the bed of all navigable portions of the Arkansas River. The Tribes claimed, however, that the United States granted a portion of the riverbed to the Tribes prior to Oklahoma's statehood. The Cherokee Nation, in particular, asserted that the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, and a subsequently issued patent granting the Tribe fee simple title to a large tract of land within the present-day boundaries of Oklahoma gave the Tribe ownership of the riverbed. The Tribe further asserted that, while most of the Indian lands were later allotted and passed to non-Indian control, the riverbed remained under tribal ownership.

The dispute between the Tribes and the State of Oklahoma eventually reached this Court, where the United States participated as amicus curiae supporting the Tribe's claim of ownership. This Court ruled that the nineteenth century treaties and patents did grant the Tribes fee simple title to the disputed portions of the riverbed. *Choc-*

taw Nation v. *Oklahoma,* 397 U.S. 620 (1970). The Tenth Circuit concluded on remand, that the Tribes hold present title as against the State of Oklahoma (461 F.2d 674, 678, cert. denied, 409 U.S. 1039 (1972)), and a special three-judge panel later determined the ownership interests among the Tribes.[2]

Following this Court's decision in *Choctaw Nation,* Congress appropriated funds to the Department of the Interior to appraise the riverbed for the purpose of assisting the Tribes in managing the property. Interior, in turn, commissioned independent appraisers to conduct a valuation. The appraisal, completed in 1976, estimated the aggregate value of the Indian interests, including the value attributable to land rentals, minerals, recreation, dam sites and hydroelectric power generation, at $177 million (App., *infra,* 2a). See *Arkansas Riverbed Rights of Cherokee, Choctaw, and Chickasaw Indian Nations: Hearing on S. 660 Before the Senate Select Comm. on Indian Affairs,* 95th Cong., 1st Sess. 13-14 (1977).

Thereafter, the Tribes sought to lease their riverbed property to the United States. The government declined their offer and the Cherokee Nation then sought compensation from Congress for damages to its mineral interests caused by construction of the McClellan-Kerr Project. Congress ultimately passed a special jurisdictional statute permitting the United States District Court for the Eastern District of Oklahoma to consider "any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal

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[2] Under that court's decision, the Cherokee Nation holds title to the entire riverbed from the Arkansas River's confluence with the Grand River to its confluence with the Canadian River (a distance of approximately 37 miles) and to the northern half of the bed from the Canadian River to the Arkansas-Oklahoma border (a distance of approximately 50 miles). See *Choctaw Nation* v. *Cherokee Nation,* 393 F. Supp. 224, 246 (E.D. Okla. 1975).

assets related to and arising from construction of the [McClellan-Kerr Project]." Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944.

3. In May 1983, the Cherokee Nation filed a complaint in the district court alleging that the construction of the McClellan-Kerr Project resulted in a taking of the Tribe's riverbed interests in violation of the Fifth Amendment and the United States' fiduciary obligations to the Tribe. The United States asserted, among other defenses, that the government's navigational servitude precludes liability for the alleged taking and that the exercise of the navigational servitude did not violate any duty owed by the United States to the Tribe. Pursuant to the parties' suggestion, the court bifurcated the trial to consider first, on cross-motions for summary judgment, the goverment's navigational servitude defense and the breach of fiduciary duty claim.

The district court granted summary judgment in favor of the Tribe. The court held that this Court's ruling in *Choctaw Nation* created a "unique situation by which a portion of the navigable Arkansas River is, essentially, a private waterway belonging exclusively to the Cherokee Nation" (App., *infra,* 26a). The court further held that the United States, having failed to reserve a navigable servitude in its treaty with a sovereign Indian nation, owed the Tribe just compensation (*id.* at 27a). The court did not address the fiduciary duty issue. The court concluded, sua sponte, that its decision "involves a controlling question of law as to which there is substantial ground for difference of opinion" (*id.* at 28a) and therefore certified the case, pursuant to 28 U.S.C. 1292(b), for interlocutory appeal.

The court of appeals granted the government's petition for interlocutory review (App., *infra,* 24a). A divided panel ultimately affirmed the district court's decision, but adopted a different analysis. The court rejected the district court's conclusion that "the failure of the United

States to reserve a navigational easement in the treaty grant" operated to defeat its constitutional power under the Commerce Clause, stating that "it is certain the United States retained a navigational servitude in the Arkansas River" (*id.* at 9a). The court nevertheless concluded that the navigational servitude did not protect the United States from liability.

The court stated that "the assertion of a navigational servitude on particular waters acknowledges *only* that the property owner's right *to use* these waters is shared with the public at large" (App., *infra,* 10a (emphasis in original)). The court further stated that the scope of the government's navigational servitude therefore depends on whether the navigational improvements interfere with property rights connected to private navigational uses or with property rights connected with other types of uses (*ibid.*). The court concluded—without citing any precedential support—that "[w]hen the exercise of that public power affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due" (*ibid.*).

The court then recited a number of factors that, it concluded, make this case "unique" (App., *infra,* 11a). It noted that the Cherokee Nation holds fee simple title to the riverbed (*id.* at 10a), that the Tribe's property interests are secured by treaty (*id.* at 12a), and that the government has a trust relationship with the Tribe (*id.* at 13a). The court also accepted the Cherokee Nation's contention that the Tribe's ownership of a portion of the Arkansas River's bed "makes the Arkansas a uniquely private waterway held by the United States in trust for the tribe" (*id.* at 15a) and that "this status has not been lost simply because the Tribe has not excluded navigation" (*ibid.*). It summarized its decision as follows (*id.* at 16a):

> The substance of what we hold here is while the United States can exercise the navigational servitude in the waterway which courses through the property of the Cherokees, and while the Cherokees cannot interfere with the exercise of this right of sovereignty, the Cherokees have a right to compensation for any consequent loss of property or diminution of value.

The court then remanded the case for a determination of damages under the taking claim and "whether the fiduciary duty owed by the United States to the Cherokee Nation was breached as a matter of fact" (*ibid.*).

Judge Seth dissented (App., *infra,* 17a-23a). He explained that the nature and source of the Tribe's title to the riverbed make no difference in determining the scope of the government's navigational servitude (*id.* at 18a). He observed that "navigable rivers are 'public property' and have been since the earliest time" (*id.* at 19a). He then surveyed the numerous decisions of this Court holding that instream and riparian property rights are held subject to the federal government's dominant power to improve navigable waters (*id.* at 19a-22a), noting that the "exercise of the servitude is not the taking of property but the exercise of a power to which the property owners have always been subject" (*id.* at 22a). He also explained that the Tribe's treaty rights do not "increase the extent or nature of the Cherokees' title" to create a " 'fee plus' " (*id.* at 23a), observing that there is no authority for treating a naturally navigable waterway as a " 'private river' " or for "creat[ing] an exception to the application of the navigational servitude because plaintiff is an Indian tribe" (*ibid.*). Finally, he rejected the notion that the Cherokee Nation could enlarge its property rights by invoking the United States' trust obligations to the Tribe (*ibid.*).

REASONS FOR GRANTING THE PETITION

The court of appeals plainly erred in concluding that the United States' construction of the McClellan-Kerr Project has resulted in a compensable taking of the Cherokee Nation's property interests. The United States' established power to improve navigation free from Takings Clause claims—its so-called "navigational servitude"—precludes private claims for instream property damage regardless of whether the claimant is a private party, a state, or an Indian tribe. The court of appeals' contrary conclusion is fundamentally inconsistent with decisions of this Court construing both the navigational servitude and the Cherokee Nation's instream property interests.

The court's ruling drastically alters the character of the navigational servitude. The court, concluding that the United States' navigational improvements are subject to the same ad hoc takings analysis that is applicable to any other species of takings claim, reduces the government's navigational servitude to no more than a mere right to ply the waters of navigable streams. The practical ramifications are serious. The decision will expose the public fisc to multi-million liability in this case alone and will encourage similar suits, by both Indian tribes and private parties, demanding comparable damages awards. Furthermore, the decision, if left uncorrected, will provide a windfall to instream property owners and will ultimately discourage the construction of navigation projects that benefit the public at large. In short, the case presents an important federal question meriting this Court's review.

1. The controlling principles here are familiar. "The Commerce Clause confers a unique position upon the Government in connection with navigable waters." *United States* v. *Rands*, 389 U.S. 121, 122 (1967). It broadly empowers the government to regulate, improve, and control navigable waters for commercial use (*id.* at 122-123). "This power to regulate navigation confers upon the

United States a 'dominant servitude,' *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S., 239, 249 (1954), which extends to the entire stream and the stream bed below ordinary high water mark." *Rands,* 389 U.S. at 123. The United States, in the exercise of its navigational servitude, may improve navigable waters free from claims for compensation from entities claiming property interests in the stream or the underlying lands.[4] As this Court has explained (*ibid.*):

> The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.

By thus permitting Congress to enhance transportation and commerce along the nation's great waterways, the navigational servitude provides substantial benefits to both riparian and nonriparian interests, upstream and downstream, and plays a significant role in the commercial unification of all components of the United States, including Indian tribes.

The navigational servitude does not, of course, "create[] a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote

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[4] *E.g., United States* v. *Grand River Dam Authority,* 363 U.S. 229, 231-232 (1960); *United States* v. *Twin City Power Co.,* 350 U.S. 222, 224-225 (1956); *United States* v. *Willow River Power Co.,* 324 U.S. 499, 509 (1945); *United States* v. *Commodore Park, Inc.,* 324 U.S. 386, 390 (1945); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.,* 312 U.S. 592, 596 (1941); *Willink* v. *United States,* 240 U.S. 572, 580 (1916); *Greenleaf Lumber Co.* v. *Garrison,* 237 U.S. 251, 258-259 (1915); *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U.S. 82, 89 (1913); *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 62-63 (1913); *Scranton* v. *Wheeler,* 179 U.S. 141, 163 (1900); *Gibson* v. *United States,* 166 U.S. 269, 271-272 (1897).

navigation." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172 (1979). For example, "[t]he navigational servitude of the United States does not extend beyond the high-water mark. Consequently, when fast lands are taken by the Government, just compensation must be paid." *Rands*, 389 U.S. at 123.[5] And when a previously private pond—made navigable through private efforts—is opened to public access against the wishes of its owners, just compensation is also due. *Kaiser Aetna*, 444 U.S. at 178-179. But the rule remains firmly established that title to submerged lands beneath a naturally navigable river "is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require." *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U.S. 82, 88 (1913). See, *e.g.*, *Kaiser Aetna*, 444 U.S. 175-176; *Rands*, 389 U.S. at 123. This Court has never deviated from the fundamental tenet that the United States owes no compensation to parties who claim that the government's navigational improvements impair their use of a naturally navigable waterway or their property interests in the waterway's bed.[6]

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[5] Notably, however, the United States bears no constitutional obligation to compensate the owner of fast lands for value attributable to riparian location. See *Rands*, 389 U.S. at 123-125.

[6] See *United States* v. *Grand River Dam Authority*, 363 U.S. at 231-232; *United States* v. *Twin City Power Co.*, 350 U.S. at 224-225; *United States* v. *Willow River Power Co.*, 324 U.S. at 509; *United States* v. *Commodore Park, Inc.*, 324 U.S. at 390; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.*, 312 U.S. at 596; *Willink* v. *United States*, 240 U.S. at 580; *Greenleaf Lumber Co.* v. *Garrison*, 237 U.S. at 258-259; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U.S. at 89; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 62-63; *Scranton* v. *Wheeler*, 179 U.S. at 163; *Gibson* v. *United States*, 166 U.S. at 271-272.

2. The court of appeals correctly recognized that the Cherokee Nation's title to submerged lands is subject to the government's dominant navigational power, stating that "it is certain the United States retained a navigational servitude in the Arkansas River" (App., *infra*, 9a).[7] The court went astray in assessing the character of the government's constitutional power. Its conclusion that the United States must pay compensation for impairment of instream property rights departs without justification from a century of contrary precedent.

a. The court of appeals erred, first, in stating—without any precedential support—that (App., *infra*, 10a):

> When the exercise of [the navigational servitude] affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due.

This is a clear misstatement of the law, at least with respect to interests within the bed of a navigable river. This Court has never held that the scope of the government's servitude

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[7] As the court of appeals recognized (App., *infra*, 9a), the district court was plainly wrong in holding that the navigational servitude cannot be applied to Indian tribes unless reserved in the relevant treaties and patents. This Court has repeatedly indicated that the navigational servitude applies without exception to all holders of riparian and riverbed interests. See, *e.g*, *United States* v. *Grand River Dam Authority*, 363 U.S. at 233 ("When the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one."). Indian tribes, like the states, are equally subject to the federal government's navigational easement. See *Montana* v. *United States*, 450 U.S. 544, 555 (1981). See also *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 63 (" 'although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude' ") (quoting *Gibson* v. *United States*, 166 U.S. at 271). For further discussion of this point, see page 15, *infra*.

depends on the private owner's use of the submerged lands; instead, the Court has repeatedly stated, without qualification, that *all* property within the bed of a navigable waterway is held subject to the government's right to make navigational improvements.[8]

For example, this Court has held that the United States can dredge navigable bays, destroying privately cultivated oyster beds, without paying compensation. *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U.S. at 87-89. The Court, in reaching this result, nowhere suggested that the non-navigational character of the oystermen's activities are relevant to the question of compensability. See also *Coastal Petroleum Co.* v. *United States,* 524 F.2d 1206 (Ct. Cl. 1975), cert. denied, 449 U.S. 1011 (1980) (destruction of limestone deposits). The Court has also held that no compensation is due where the government's navigational improvements interfere with other non-navigational activities, including the placement of bridges in or over navigable waters,[9] and the use of stream flow for hydropower development activities.[10] In short, the govern-

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[8] See *Kaiser Aetna,* 444 U.S. at 175-176 (quoting *Scranton* v. *Wheeler,* 176 U.S. at 163); *United States* v. *Rands,* 389 U.S. at 123; *United States* v. *Twin City Power Co.,* 350 U.S. at 224-225; *United States* v. *Willow River Power Co.,* 324 U.S. at 509; *United States* v. *Commodore Park, Inc.,* 324 U.S. at 390; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.,* 312 U.S. at 596; *Willink* v. *United States,* 240 U.S. at 580; *Greenleaf Lumber Co.* v. *Garrison,* 237 U.S. at 258-259; *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U.S. at 87-89; *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. at 62; *Scranton* v. *Wheeler,* 179 U.S. at 163; *Gibson* v. *United States,* 166 U.S. at 271-272.

[9] *Louisville Bridge Co.* v. *United States,* 242 U.S. 409, 421 (1917); *Union Bridge Co.* v. *United States,* 204 U.S. 364, 400-401 (1907).

[10] *United States* v. *Grand River Dam Authority,* 363 U.S. at 231; *Twin City Power Co.,* 350 U.S. at 225-226; *United States* v. *Willow River Power Co.,* 324 U.S. at 509; *United States* v. *Chandler-Dunbar Water Power Co.* 229 U.S. at 72. Notably, the Cherokees, in this case, demand compensation for claimed interference with their dam site and hydropower development opportunities. See Complaint 8-9.

ing rule in the instant case is plain and firmly established: the government owes no compensation when navigational improvements impair or destroy property located within the bed of a naturally navigable body of water. The court of appeals' ad hoc balancing of interests dramatically departs from this long settled constitutional principle.[11]

b. Even if it were appropriate to conduct a balancing of public and private interests, the court here plainly relied on factors that are simply irrelevant to a takings analysis.

For example, the court relied (App., *infra,* 10a) on the fact that the Cherokee Nation holds fee simple title to the riverbed. However, there is nothing unique about fee simple ownership of riverbed interests. The states, under the Equal Footing Doctrine, generally acquire fee simple title to lands beneath navigable waters upon their entry into the Union. See, *e.g., Montana* v. *United States,* 450 U.S. 544, 551 (1981). And private parties may hold fee simple title to lands beneath navigable waters through grants from the federal and state governments (see, *e.g., id.* at 551-552) or by principles of state property law (see, *e.g., United States* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.,* 312 U.S. 592, 596 (1941); *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 60-61 (1913)). This Court has long held that "although the title to the shore and submerged soil is in the various States and individual owners under them it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution." *Id.* at 63 (quoting

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[11] The court of appeals' ruling apparently originates in a misreading of cases dealing with compensation for navigational improvements that impair property *above* the high water mark. See App., *infra,* 10 a. The general rule, set forth in *Rands,* is that an owner is entitled to compensation for the taking of fast lands, but value attributable to riparian location, such as power site or port site value, is noncompensable absent a specific statutory allowance. 389 U.S. at 123-125. That rule has no application to this case since the Tribe owns only the stream bed.

Gibson v. *United States*, 166 U.S. 269, 272 (1897)). There is no reason why the Cherokee Nation's title should be treated differently.

The court of appeals also attempted to distinguish this case on the ground (App., *infra*, 11a) that the Cherokee Nation received its title through a treaty with the United States. But the Tribe's property rights do not turn on the form of the conveyance. The Cherokee Nation, like any owner of lands beneath navigable waters, took its riverbed interest subject to the federal government's power under the Commerce Clause to regulate and promote navigation. As the court of appeals itself recognized (*id.* at 9a), the United States did not need to reserve its Commerce Clause powers in its treaties with the Indian tribes. See, *e.g.*, *Cherokee Nation* v. *Southern Kansas Ry.*, 135 U.S. 641, 656-657 (1890) (holding that Cherokee lands are subject to federal power of eminent domain). The navigational servitude is a constitutional power rather than a property right. *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224-225 (1956). Accordingly, the government is not obligated to reserve the servitude in Indian treaties and patents. Thus, the Tribe has no legitimate claim that the government's assertion of its navigational servitude abrogates any tribal treaty right.[12]

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[12] Notably, the United States had recognized the Arkansas River as an important commercial artery at the time of the treaty and had already made navigational improvements to the lower reaches of the waterway. See H.R. Doc. 195, 23d Cong., 2d Sess. (1835). The Cherokees, although characterizing the river as a "private waterway" (App., *infra*, 15a), have never had an exclusive claim to its use. In all events, even property interests in submerged lands that predate the formation of the Union—including title to submerged lands within the original thirteen colonies—are subject to the navigational servitude. See *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U.S. at 86; *South Carolina* v. *Georgia*, 93 U.S. 4, 10 (1876). There is no reason to give the Cherokees a special exemption from the United States' generally applicable constitutional powers.

The court of appeals' reliance (App., *infra,* 12a) on the government's fiduciary obligations to the Tribe is similarly misplaced. Certainly, the government does not violate its trust responsibilities by refusing to pay Indian tribes for impairment of noncompensable interests. And the court seriously errs in characterizing the Arkansas River as "a uniquely private waterway held by the United States in trust for the tribe" (*id.* at 15a). This Court has repeatedly stated that navigable waters are " '[incapable] of private ownership.' " *Kaiser Aetna,* 444 U.S. at 179, quoting *United States* v. *Chandler-Dunbar Co.,* 229 U.S. at 69. A private party may hold title to a riverbed or adjoining fast lands, but the stream itself remains " 'public property of the nation, and subject to all the requisite legislation by Congress.' " *Rands,* 389 U.S. at 123, quoting *Gilman* v. *Philadelphia,* 71 U.S. (3 Wall.) 713, 724-725 (1866).

In short, the court of appeals failed to identify any convincing basis for exempting the Cherokee Nation from the United States' firmly established Commerce Clause powers.[13]

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[13] Although the court of appeals premised the government's Fifth Amendment liability, in part, on fiduciary principles (App., *infra,* 13a-14a), it also instructed the district court to determine "whether the fiduciary duty owed by the United States was breached as a matter of fact" (App., *infra,* 16a). Thus, the court of appeals apparently believed that the Tribe is entitled to additional recovery under its fiduciary duty claim. However, that claim fails for the same reason that fiduciary principles are irrelevant to the takings analysis. The government does not violate its trust responsibilities by exercising valid constitutional powers that advance the general public interest. This Court has indicated that the exercise of valid governmental powers that incidentally affect Indian interests does not constitute a breach of fiduciary obligations. *Nevada* v. *United States,* 463 U.S. 110, 128 (1983). See also *Cherokee Nation* v. *Southern Kansas Ry.,* 135 U.S. 641 (1890) (Indian tribes are subject to federal eminent power); *Seminole Nation* v. *United States,* 492 F.2d 811, 819 (Ct. Cl. 1974) (same); *Moore* v. *United States,* 157 F.2d 760, 765 (9th Cir. 1946),

c. The court of appeals not only misapplied the United States' navigational servitude, it also ignored this Court's prior determination of the scope of the Cherokee Nation's property interests. In *Choctaw Nation*, this Court held that the Indian Tribes received fee simple title to portions of the bed of the Arkansas River. But the Court specifically observed that the United States retained its navigational servitude in the Arkansas River, stating that "the United States seems to have had no present interest in the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce." 397 U.S. at 635. This Court thus recognized that the Tribes' ownership of the riverbed is subject to familiar Commerce Clause constraints.[14]

The Court's statement was not inadvertent dicta. The Indian tribes, in briefing that case, expressly agreed that their riverbed interests were subject to the United States' navigational servitude. The Cherokee Nation, in its opening brief, stated that "there is nothing in the conveyance of title to the land beneath the navigable waters which conflicts with the power of the Government to hold such lands for navigation. *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946)." Cherokee Nation Br. 19. See also Choctaw and Chickasaw Nations Br. 48-49; United States Br. 24. The Tribe forcefully reiterated this point in its reply brief, specifically stating (Cherokee Reply Br. 13-14):

> Throughout their brief respondents imply that if title to the river were vested in the [Tribe] and not in the state (under the equal footing-implied trust doctrine)

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cert. denied, 330 U.S. 827 (1947) ("The fact that navigable waters are a part of a reservation held in trust for the Indian fisheries does not conflict with the trust also to hold them for the public for navigation.").

[14] See also *Montana* v. *United States*, 450 U.S. 544, 555 (1981) ("the United States retains a navigational easement in the navigable waters within the described boundaries [of the Crow Reservation] for the benefit of the public, regardless of who [Montana or the Crow Tribe] owns the riverbed").

> the authority and power of the United States could somehow be compromised. Such an inference is absurd; no matter who holds title to the riverbed, the [Tribe] or the state, the rights and power of the United States are precisely the same.

The Cherokee Nation, having established its ownership of the riverbed, now seeks to disown its prior representations to this Court.

3. This case has serious practical ramifications. Of immediate concern, the court of appeals' decision threatens the United States with multi-million dollar liability, in this case alone, for traditionally noncompensable damages. The Tribe has not quantified its alleged damages, but it has requested fair market value for "the Cherokee Nation's lands," "past and future loss of the sand and gravel and coal deposits," and "the damsites thus taken by [the United States] and for the electrical energy generated at such sites" (Complaint 8-9). The court of appeals, stating that "the Cherokees have a right to compensation for any consequent loss of property or diminution in value" (App., *infra,* 16a), apparently contemplated that all of these alleged damages are compensable. As previously noted, the Department of the Interior's 1976 appraisal estimated that portions of the riverbed held collectively by the Cherokees, Choctaws, and Chickasaws were worth $177 million, of which $133 million was attributable to the Cherokee Nation. See *Arkansas Riverbed Rights of Cherokee, Choctaw, and Chickasaw Indian Nations: Hearing on S. 660 Before the Senate Select Comm. on Indian Affairs,* 95th Cong., 1st Sess. 13-14 (1977). The Tribe will no doubt claim that they are entitled to damages of at least that amount.

The court of appeals' decision will also affect other pending litigation. For example, the United States is presently defending a similar suit in which the Colville Tribe has claimed damages of more than $130 million based on the

United States' construction of the Grand Coulee Dam on the Columbia River. *Confederated Colville Tribe* v. *United States,* No. 181-D (Claims Ct.). See 39 Indian Cl. Comm'n 159 (1979). In addition, the Department of the Interior believes that at least 12 other Indian tribes have substantial claims to ownership of lands beneath navigable rivers and, consequently, could assert claims against the government for damage caused by navigational improvements.

Finally, the court's rationale, dramatically altering the character of the navigational servitude, is not limited to Indian tribes. The court's ruling that the United States' navigational improvements are subject to the same ad hoc takings analysis that is applicable to any other species of takings claim logically reduces the government's navigational servitude to no more than a mere right to ply the waters of navigable streams. The decision will encourage suits by private parties demanding compensation for damages that previously were considered noncompensable. The decision, if left uncorrected, will upset settled expectations, will provide a windfall to instream property owners at the public expense, and will ultimately discourage the construction of navigation projects that benefit the public at large. In sum, the case presents an important federal question meriting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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MAY 1986

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 84-2355

CHEROKEE NATION OF OKLAHOMA,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 83-306-C)

Before MOORE and SETH, Circuit Judges, and MATSCH, District Judge.*

MOORE, Circuit Judge.

This is an interlocutory appeal granted pursuant to 28 U.S.C. § 1292(b) to consider whether the assertion of a navigational servitude by the United States prevents liability for an alleged Fifth Amendment Taking of land held in fee simple by the Cherokee Nation of Oklahoma (Cherokee Nation or appellee). A second issue, whether the exercise of a navigational servitude constituted the breach of some duty of care to the Cherokee nation, was reserved pending this appeal. The district court sustained

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* Honorable Richard P. Matsch, United States District Judge for the District of Colorado, sitting by designation.

the Cherokee Nation's motion for summary judgment, holding that the United States, having granted fee simple title to the banks and bed of the Arkansas River with no reservation of a navigational servitude, is liable for a taking of private property and must pay just compensation. The United States sought interlocutory review contending the construction of the Arkansas River Navigation System, the McClellan-Kerr Navigation Project (the Project), does not constitute a compensable taking of the Cherokee Nation's interest in the bed of the Arkansas River. Upon our review of the facts of this particular case and the law, we affirm the district court's holding but do not adopt its reasoning. We do not address the second issue.

By statute, Pub. L. No. 97-385, 96 Stat. 1944 (1982),[1] Congress conferred special jurisdiction on the district court to hear the Cherokee Nation's claim for damages.[2]

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[1] The statute provides in part:

> [J]urisdiction is hereby conferred upon the United States Court of Claims, or upon the United States District Court for the Eastern District of Oklahoma, to hear, determine, and render judgment, under the jurisdictional provisions of section 2 of the Indian Claims Commission Act of August 13, 1946, as amended (60 Stat. 1049, 1050; 25 U.S.C. 70a), on any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from construction of the Arkansas River Navigation System, including, but not limited to, the value of sand, gravel, coal, and other resources taken, the value of damsites and powerheads of dams constructed on that part of the Arkansas riverbed within Cherokee domain in Oklahoma, without the authority or consent of said Cherokee Nation. . . .

[2] This claim derives from an initial appraisal done by the Department of Interior after the Supreme Court concluded the Cherokee Nation held title to the bed and banks. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). The Department of Interior valued the entire Cherokee interest in the riverbed at $177 million. From 1976 until

The Cherokee Nation alleged that to create the Project, the United States constructed dams and waterways, altering the channel of the river and causing the loss of valuable deposits of sand, gravel, and coal. Specifically, the Webbers Falls Lock and Dam No. 16, the Robert S. Kerr Lock and Dam No. 15, and the W. D. Mayo Lock and Dam No. 14, were designated as located in whole or in part on Indian lands granted in the 1838 patent. The Cherokee Nation alleged a Fifth Amendment Taking and sought just compensation for the past and future loss of the mineral deposits, fair market value of the damsites, and other damage to the bed and banks of the Arkansas River. The parties stipulated to the facts and agreed to address the issue of liability separately on cross-motions for summary judgment.

I. Standard of Review

We premise our review of the district court's granting judgment in favor of the Cherokee Nation, on cross-motions for summary judgment, on the same considerations before the trial court under Fed. R. Civ. P. 56(c). *United States v. Gammache*, 713 F.2d 588, 594 (10th Cir. 1983). In examining the record, we, too, must decide whether any genuine issues of material fact exist to preclude one of the cross-movants from proceeding to litigate that issue. Any inferences appropriately arising must be viewed in the light most favorable to the party against whom they are offered. *Weir v. The Anaconda Co.*, [773] F.2d [1073], (10 Cir. Aug. 9, 1985); *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411 (10th Cir. 1984). An ultimate determination is equally and neces-

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1980 neither Congress nor the Department of Interior could agree on liability or an appropriation for the loss. After Congress failed to act on the Cherokees' direct petition for $8.5 million in claimed damages, this special jurisdictional grant was enacted to litigate the claim.

sarily predicated on the correct application of the substantive law. *Daitom, Inc. v. Pennwalt Corp.* 741 F.2d 1569, 1574 (10th Cir. 1984); *Western Casualty & Surety Co. v. National Union Fire Insurance Co.*, 677 F.2d 789 (10th Cir. 1982). This standard is not talismanic but fully requires that we look beyond the pleadings to determine whether the moving parties present any factual dispute capable of a trial's resolution. We must be convinced beyond a reasonable doubt that this "salutary device" appropriately resolves the issue before us. Fed. R. Civ. P. 56 advisory committee note; *See also Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F.2d 33, 36 (10th Cir. 1975).

II. Background

Although the facts giving rise to this particular case are not in dispute, a conflicting view of the broader historical background underpins the divergent legal analysis. Our task is simplified by the Supreme Court's review in *Choctaw Nation v. Oklahoma*, 397 U.S. 619 (1970), on which the district court also relied. At issue in *Choctaw Nation* was the title to land underlying certain navigable portions of parts of the Arkansas River in Oklahoma. Beginning with the post-revolutionary period, the Court traced the early history of the Cherokee Nation as it, like the other Five Civilized Tribes,[3] experienced the increasing pressure of white settlement in their territory and the correspondingly insistent federal removal policy. Wary of promises of a permanent home and federal protection, the Cherokees resisted relocation and met with hostility, both from the

[3] The Cherokees, Creeks, Choctaws, Chickasaws and Seminoles comprise the "Five Civilized Tribes."

State of Georgia, where the Cherokees were settled, and the federal government, which was anxious to placate white settlers.[4]

The Court reviewed this history as background for an understanding of the Treaty of New Echota, signed on December 29, 1835, and negotiated with a faction of the Cherokees fearful of a forced military removal. In the Treaty of New Echota, the United States granted a vast area of its western territory, now the eastern part of the State of Oklahoma, in exchange for the cession of all Cherokee land east of the Mississippi River. *Choctaw Nation*, 397 U.S. at 627. The United States covenanted to convey these lands in fee simple. The Cherokee Nation was promised a permanent home which would "never be embraced within the boundaries of any State or Territory." Treaty of New Echota, December 29, 1835, 7 Stat. 478, 2 Kapp 439. In 1838, those Cherokees who refused voluntary removal suffered the forced migration, later referred to as the "Trail of Tears,"[5] to these western lands. The Treaty of New Echota was intended to provide a permanent and enduring resolution for the Cherokee Nation. *Choctaw Nation*, 397 U.S. at 635.

Nevertheless, these solemn vows were tested by new settlement pressure in Indian territory. *Id.* at 628. Unable to relocate the Cherokees, the new federal policy sought instead to allot Indian lands and terminate tribal affairs in

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[4] *See* F. Cohen, Handbook of Federal Indian Law 78-84 (1982 ed.) and citations therein. Georgia's confrontation with the Cherokees precipitated a crisis between the Cherokees, the Supreme Court and Georgia. As related by Cohen, Georgia, impatient with the federal removal policy, extinguished Indian title and sought to distribute the Cherokee lands. Consequently, some Cherokees were initially resettled in Arkansas.

[5] More than 4,000 Cherokees perished in the march. "The Trail of Tears has come to symbolize the brutality of Indian removal." Cohen at 92.

order to facilitate Oklahoma's admission to the Union on an "Equal Footing" with the original states. Oklahoma relied on this Equal Footing Doctrine in *Choctaw Nation* to claim title to the bed of the Arkansas River in which Oklahoma had executed various leases.

In holding that the United States intended to and did convey to the Indians fee simple title to the bed of the Arkansas River, the *Choctaw* court relied on both "the circumstances of the treaty grants and the countervailing rule of construction" that treaties with Indian nations must be interpreted as the Indians would have understood their meaning.[6] Citing *Shively v. Bowlby*, 152 U.S. 1 (1894) (title to the riverbed is an incident of state sovereignty); *Brewer-Elliott Oil and Gas Co. v. United States*, 260 U.S. 77 (1922) (Congress has the power to convey land below the high water mark of navigable waters; thus, the United States expressly conveyed a portion of riverbed to Osages); and *United States v. Holt State Bank*, 270 U.S. 49 (1926) (United States' intention to convey must be definitely declared), the Court recognized that the literal letter of these holdings did not require that "courts blind themselves to the circumstances of the grant in determining the intent of the grantor." *Choctaw Nation*, 397 U.S. at 635. The Court added:

> As a practical matter, reservation of the river bed would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands. . . . We do not be-

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[6] The Court noted that "these treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's length transaction. Rather treaties were imposed upon them and they had no choice but to consent." *Choctaw Nation*, 397 U.S. at 631.

> lieve that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise.

Id. at 636. The Court gave full effect to the government's promise that no State or Territory would ever embrace the lands granted and refused to engage in the legal fiction that the river bisecting the Cherokee land was excluded from the grant. In a later appeal, we affirmed the district court's order on remand from *Choctaw Nation*, holding that the Supreme Court had decided past and present ownership. *Cherokee Nation v. Oklahoma*, 461 F.2d 674, 677-78 (10th Cir. 1972).

III. Navigational Servitude

A.

Against this background, we now decide whether the district court erred in holding that the failure to reserve a navigational servitude in the patent amounted to a loss of the right to assert it. The United States argues the navigational servitude is a constitutional power arising from the Commerce Clause and permits no "special exception" for Indian tribes. To conclude, as did the district court, that having failed to reserve a navigational servitude, the United States loses that power is "unprecedented" according to appellant. Moreover, contrary to the district court's reference to the Cherokee Nation as a sovereign nation, the United States contends the appellee is a quasi-sovereign at the sufferance of Congress and subject to the dominant power of a navigational servitude. Indeed, appellant concludes that if the fact the Cherokees own the riverbed is set aside, this case is only an "ordinary instance" in which the United States seeks to assert its dominant authority.

The government supports its position by focusing on the following language of *Choctaw Nation*: "Indeed the United States seems to have had no present interest in the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce." *Choctaw Nation,* 397 U.S. at 636. Although the Court was concerned with the issue of title in *Choctaw Nation*, the quoted language being merely dictum, it is instructive here to provide direction for our inquiry.

We agree with appellant that the term navigational servitude describes the superior interest of the United States in navigation and the nation's navigable waters. *United States v. Twin City Power Co.,* 350 U.S. 222, 224 (1956). "The servitude derives from the Commerce Clause and is a concept of power, not of property." *Id.* The term expresses the notion that the right of the public to use a waterway supersedes any claim of private ownership. *United States v. Cress,* 243 U.S. 316 (1917); *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53 (1913). Indeed, as a matter of federal power, the navigational servitude has been most useful in defining federal interests when conflicting state and local controls are imposed on interstate waters. *See Twin City Power, supra.*

In the interest of interstate commerce, to improve navigation, and to preserve the waterways for public use, the navigational servitude may thus be asserted as an exception to the Taking Clause. This exception derives from the principle that the power over our nation's waters is an incident of sovereignty. *Shively v. Bowlby,* 152 U.S. 531 (1893). However, while the exercise of the navigational servitude may create an exception to the government's obligation to pay just compensation under the Eminent Domain Clause of the Fifth Amendment, the Supreme Court has never held that "the navigational servitude creates a blanket exception to the Taking Clause whenever Congress exercises its Commerce Clause authority to pro-

mote navigation." *Kaiser Aetna v. United States,* 444 U.S. 164, 172 (1979). Each case requires an ad hoc examination and balancing of the public and private rights at stake. *Cress,* 243 U.S. at 321.

At the outset, we are not impressed by the failure of the United States to reserve a navigational easement in the treaty grant, despite other reservations.[7] As stated, the navigational servitude is a power arising from the Commerce Clause and triggered by the perception of Congress that this dominant right exists in the interest of navigation. Thus, it is certain the United States retained a navigational servitude in the Arkansas River. The existence of the power is not at issue. Rather, it is its effect that concerns us.

The Supreme Court has reviewed a variety of cases on the issue of whether compensation is required in specific instances when a navigational servitude is exercised. One group of claimants denied recovery is riparian owners claiming losses arising from the raising or lowering of the water level in a navigable stream. *See, e.g., Twin City Power, supra.,* and *Chandler-Dunbar, supra.* No compensation is required for private improvements connected to fastlands but located in navigable waters. *See, e.g, United States v. Runds,* 389 U.S. 121 (1967); *United States v. Commodore Park,* 324 U.S. 386 (1945); *United States v. Chicago, M., St. P. & P. R. Co.,* 312 U.S. 592 (1941). Nor is compensation ordered when structures in the water

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[7] The grant was made "subject to the right of the United States to permit other tribes . . . to get salt on the salt plain" and included three reservations: (1) the right to permit other tribes to get salt on the western part of the grant; (2) any rights to lands assigned the Quapaws which might be within the bounds of these Cherokee lands; and (3) the right to establish and maintain military posts and roads, together with the free use of land, timber, fuel, and materials for the construction and support of those facilities.

(wharves, ferry docks) are condemned or altered to improve navigation or navigational safety. *Greenleaf Lumber Co. v. Garrison,* 237 U.S. 251 (1915); *United States v. City of Valdez,* 666 F.2d 1236 (9th Cir. 1982).

However, in each of these cases, the Supreme Court has emphasized that "the non-compensable loss was related, either directly or indirectly to the riparian owner's 'access to, and use of, navigable waters.' " *Kaiser Aetna,* 444 U.S. at 189 (Blackmun, J., dissenting) (citing *Rands,* 389 U.S. at 124-125). Even the *Kaiser* dissent acknowledged that the distinction between compensable and non-compensable values should have nothing to do with the *use* of navigable waters. Moreover, it is the character of the invasion, not the amount of damage resulting from it, that determines whether a taking has occurred. *Cress,* 243 U.S. at 328.

Thus, the assertion of a navigational servitude on particular waters acknowledges *only* that the property owner's right *to use* these waters is shared with the public at large. *Rands,* 389 U.S. at 125. When the exercise of that public power affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due. The navigational servitude is not without constitutional limitation. Furthermore, if Indian property is taken for non-Indian use within this context, constitutional strictures are equally applicable. *See Shoshone Tribe of Indians v. United States,* 299 U.S. 476 (1937); *Choate v. Trapp,* 224 U.S. 665 (1912).

The uniqueness of the present case derives from the Cherokee Nation's fee simple ownership of the banks and bed of the Arkansas River. The Cherokee Nation is not a mere riparian owner. Title to the banks and bed above and below the high water mark resides with the tribe. This ownership is secured by treaty. The *Choctaw* court was unequivocal in deciding that the treaty could only be

understood in the context of the Cherokee Nation's history. The United States intended that title to the dry bed left from avulsive changes in the river's course remain with the tribe. *Choctaw Nation,* 397 U.S. at 634. Similarly, if the river is flooded and Indian lands and resources that had once been dry bed are altered or destroyed, the Cherokee Nation's tribal assets have equally been affected.

The Court has recognized that *Choctaw Nation* is unique in a line of cases construing reservation grants and treaty rights. In *Montana v. United States,* 450 U.S. 554 (1981), the nature and scope of the Crow Nation's power to regulate hunting and fishing rights by non-Indians was at issue. The Court held that title to the riverbed did not pass with the grant of tribal lands. Distinguishing *Choctaw Nation*, the Court explained, "the finding of a conveyance of the riverbed in *Choctaw Nation* was based on very peculiar circumstances not present in this case." *Id.* at 556, n.5. The Court underscored the "special emphasis" placed on the government's promise that the lands reserved to the Choctaws and the Cherokees would never become part of any state. "Neither the *special historical origins* of the Choctaw and Cherokee treaties nor the *crucial provisions* granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868." *Id.*[8]

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[8] The government cites *Montana* to support its contention that the navigational servitude precludes the Cherokee Nation's taking allegation. The cases are not similar. The *Montana* court expressly held that title to the river passed to the state upon its admission to the Union; *Choctaw Nation* holds that opposite. *Confederated Salish and Kootenai Tribes v. Namen,* 534 F.2d 1376 (9th Cir.), *cert. denied,* 429 U.S. 929 (1976), is equally inapposite to the government's argument.

In the face of the Supreme Court's emphasis of the special circumstances surrounding the grant to the Cherokee Nation, we must also consider the principle that rights secured by treaty will not be deemed to be abrogated or modified absent a clear expression of Congressional purpose. *United States v. Winnebago Tribe of Nebraska,* 542 F.2d 1002, 1005 (8th Cir. 1976). "[T]he intention to abrogate or modify a treaty is not to be lightly imputed to Congress." *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 413 (1968); *Accord Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1979).

Appellee cites *Squire v. Capoeman,* 351 U.S. 1 (1956), a tax case involving Indian lands, for the proposition that the language used in treaties with the Indians must be read to assure the full Congressional intention behind the grant. In concluding that timber harvested from Indian lands was not subject to capital gains tax, the *Capoeman* court noted that adding a tax to the product of the land set aside by the treaty would "erode" the "major value" of the land. "The land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him." *Id.* at 10. Similarly, to take a valuable portion of the grant to the Cherokee Nation without compensation would alter the purpose for which Congress set aside the land originally. *See also Moore v. United States,* 157 F.2d 760 (9th Cir. 1946).

Indeed, the Supreme Court has recognized that Indian treaty rights are a form of property protected by the Fifth Amendment. *See Menominee Tribe,* 391 U.S. at 413; *Shoshone Tribe,* 299 U.S. at 497. Moreover, the Congressional power of eminent domain is strictly construed when Indian trust property is at issue. *United States v. Creek Nation,* 295 U.S. 103, 110 (1935). Thus, if the effect of exercising a navigational servitude is to alter or extinguish rights secured by treaty and unrelated to the power to use

without the express authorization of Congress, just compensation is required.[9] To create as sweeping a power for which the government here argues in the light of these constitutional safeguards would distort the very nature and scope of the navigational servitude.

B.

The exercise of the navigational servitude must also be examined within the context of the trust relationship between the Cherokee Nation and the federal government. Although the Cherokee lands were allotted, Congress provided that the remaining unallotted tribal property would "be held in trust by the United States for the use and benefit of the Indians." Act of April 26, 1906, § 27, 34 Stat. 148, cited in *Choctaw Nation,* 397 U.S. at 627. This trust responsibility articulated in the earliest Indian cases[10] mandates not only a standard of conduct but also a limitation of Congressional power. In *United States v. Sioux Nation of Indians,* 448 U.S. 371 (1980), the Supreme Court stated that in every case where a taking of treaty-protected property is alleged, a reviewing court must recognize that tribal lands are subject to the Congressional power to control and manage the tribe's affairs. "[T]his

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[9] Congress must specifically authorize the taking of Indian trust property. *United States v. Santa Fe Pac. R. Co.,* 314 U.S. 339 (1941). *See also Winnebago Tribe of Nebraska, supra.* In *Winnebago,* the court held that the United States, through the Army Corps of Engineers, was without authority to take tribal lands by eminent domain without an express Congressional authorization for a project authorized by the 1944 Flood Control Act, which similarly authorized construction of the McClellan-Kerr Navigation Project.

[10] *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *United States v. Kagama,* 118 U.S. 375 (1886). Justice Marshall's early characterization of these "domestic dependent nations . . . in a state of pupilage" best resembling the relationship of "a ward to his guardian" is often quoted.

power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions." *Id.* at 415.

The Cherokee Nation contends that a fiduciary relationship between the United States and the tribe imposes a distinct obligation on the government in dealing with dependent Indian wards. Like any other trust relationship, the United States, as trustee, is obligated to act for the benefit the of the tribe absent Congressional authorization to the contrary. *See United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 356 (1941). Congress did not include an authorization to take, compensation for the taking, or a statement of overriding public need as related to these particular lands when it enacted the 1944 Flood Control Act and designated the Arkansas River Project. *See Winnebago Tribe of Nebraska, supra.*

The government urges that the Cherokee Nation's reliance on fiduciary principles is misplaced and that we should look solely to constitutional law to define the tribe's property rights in the river. To the contrary, the Cherokee Nation's constitutionally protected property rights are subject to Congress' power to control and manage. *Creek Nation,* 295 U.S. at 109-110. "[T]hat power does not extend so far as to enable the government 'to give tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation.' " *Shoshone Tribe,* 229 U.S. at 497 (citation omitted). Nor can that duty be preempted and subsumed by the navigational servitude.

C.

The government argues that there are no exceptional circumstances present in this case to remove its scrutiny from the routine analysis given any application of a naviga-

tional servitude. We believe that the language of *Choctaw Nation* and *Montana* refutes this contention. Our result is hinged on this precedent. The Cherokee Nation has never asserted exclusive use or control of the Arkansas River, nor has it denied the power of the federal government to exercise its dominant control over interstate commerce. Instead, the Cherokee Nation maintains that its title to part of the Arkansas River makes the Arkansas a uniquely private waterway held by the United States in trust for the tribe. Contrary to the government's inference, this status has not been lost simply because the tribe has not excluded navigation. The Cherokee Nation has not contested the government's right to use the navigable waters, but complains only of the effect of that use on its property interest.

The government finally warns that if we affirm the district court, we give leave to untold numbers of tribes seeking compensation for similar activity on waterways in their lands. Yet, from all we have said, it should be clear the result here is tied to and limited by the unique circumstances of Cherokee history and the terms of the treaty patent. Whatever other actions our holding might generate cannot preclude a just result in this case.

The government asks us to disregard the absolute grant in the treaty, the rules of construction of treaties, and the trust relationship, each a separate check on Congressional power, to hold that the navigational servitude represents a preemptive power exempting it from liability. This we cannot do. We do not question the exercise of the navigational servitude to improve the navigation in the Arkansas River. We do question the impact of that exercise on the subservient property. We hold the navigational servitude does not exempt the United States from liability for the alleged taking of tribal property.

IV. Conclusion

The substance of what we hold here is while the United States can exercise the navigational servitude in the waterway which courses through the property of the Cherokees, and while the Cherokees cannot interfere with the exercise of this right of sovereignty, the Cherokees have a right to compensation for any consequent loss of property or diminution of value. This right arises out of, and is circumscribed by, the Treaty of New Echota, and has nothing to do with riparian rights normally flowing from the ownership of property adjacent to waterways.

In light of this holding, it remains for the trial court to determine whether and to what extent the Cherokee Nation has been injured by the exercise of the navigational servitude. This will require a factual inquiry not dissimilar from that undertaken in an ordinary condemnation case. The trial court will also have to consider the second question raised but reserved during the course of this appeal, and that is whether the fiduciary duty owed by the United States to the Cherokee Nation was breached as a matter of fact. The result reached by the trial court on the issue appealed is affirmed.

84-2355

CHEROKEE NATION OF OKLAHOMA

v.

UNITED STATES OF AMERICA

SETH, Circuit Judge, dissenting:

I must respectfully dissent from the position taken by the majority for the reasons hereinafter expressed.

This is an action for compensation for property used by the United States in the Arkansas River Navigation Project. The plaintiff asserts that the Arkansas River is a "private stream" belonging to the Cherokees because they own the stream bed under a title acquired from the United States. Plaintiff nevertheless acknowledges that it is a navigable river. The Government argues that its exercise of the navigational servitude rights under the Constitution is founded on improvements to navigation directed by Congress on a navigable river and thus the nature of the ownership of the stream bed or how such title may have been acquired is not significant.

The improvements to navigation on the Arkansas River have extended over a long period of time. The river is one of the great rivers of the country and provided access from the Mississippi to the West since early times. The river traffic is now large. The improvements to navigation with which we are here concerned were directed by Congress in 1946 (Act of July 24, 1946). The Project completed in 1971 was known as the McClellan-Kerr Arkansas River Navigation System. There can be no serious challenge to the fact that Congress determined that the Project was for the benefit of navigation and that this was a "legislative judgment." United States v. Twin City Power Co., 350 U.S. 222.

The plaintiff herein was one of the petitioners in Choctaw Nation v. Oklahoma, 397 U.S. 620, decided by the Supreme Court in 1970. The Court there held after considering the treaties and patent:

> "[T]he United States intended to and did convey title to the bed of the Arkansas River below its junction with the Grand River . . . in the grants it made to petitioners."

397 U.S. at 635-36. By this litigation which concerned only the bed of the river, it was determined that the Cherokees received title by patent to the entire river bed of the Arkansas from the Grand River to the Canadian River and the North one-half of the bed from the Canadian to the Arkansas-Oklahoma State line as against the claim of the State of Oklahoma. This title was a determinable fee and was an execution of the title obligations in the several treaties. The patent, of course, covered a large tract of land of which the disputed stream bed was a small element.

The Cherokee lands were made subject to allotments to individual Indians beginning about 1898 (30 Stat. 495) as was done generally throughout the country as a matter of policy. (See the General Allotment Act of 1887.) Much of the land was allotted and the remainder is held in trust by the United States for the Cherokees. The Tribe ceased to exist as a governmental entity in 1906 but was later reorganized.

This action is based by plaintiff on its undisputed ownership of the bed of the Arkansas River. The claim apparently is not based on riparian ownership, but it is obvious that the plaintiff was at one time a riparian owner and may be now as to some tracts. But, in any event, the nature and source of plaintiff's title makes no real difference.

All concerned acknowledge that the Arkansas River in this area is navigable. It carries a substantial tonnage of

freight and has been an active waterway since the settlement of the West. The Court in *Choctaw,* as indicated, was concerned with title to the stream bed but nevertheless stated:

> "Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce."

397 U.S. at 635. The Cherokees, as stated in Cherokee Nation v. Oklahoma, 402 F.2d 739, 745 (10th Cir.), had taken the position that the ownership of the stream bed was "not necessary to the exercise of control over navigation incidental to the authority of the Government under the Commerce Clause."

In any event, in this country navigable rivers are "public property" and have been since the earliest time. Gilman v. Philadelphia, 70 U.S. 713; United States v. Rands, 389 U.S. 121. Navigation on such rivers has been under the exclusive control of the federal Government—of Congress—under the Commerce Clause. Gibbons v. Ogden, 22 U.S. 1.

In United States v. Rands, 389 U.S. 121, 122-23, the Court said:

> "The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States . . . . For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.' *Gilman* v. *Philadelphia,* 3 Wall. 713, 724-725 (1866). This power to regulate navigation confers upon the United States a 'dominant servitude,' *FPC* v. *Niagara Mohawk Power Corp.,* 347 U.S. 239, 249 (1954), which ex-

> tends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596-597 (1941); *Gibson* v. *United States,* 166 U.S. 269, 275-276 (1897)."

The Court on this subject has relied frequently on United States v. Chicago, Milwaukee, St. Paul & P. R. Co., 312 U.S. 592. The opinion in that case considers several issues here raised. The Court there in part said, at 596-97:

> "And the determination of the necessity for a given improvement of navigable capacity, and the character and extent of it, is for Congress alone. Whether, under local law, the title to the bed of the steam is retained by the State or the title to the riparian owner extends to the thread of the stream, or, as in this case, to low-water mark, the rights of the title holder are subordinate to the dominant power of the federal Government in respect of navigation.
>
> . . . .
>
> "The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation."

The Court there held that the determination of the need for improvement to navigation "is for Congress alone." The navigational servitude doctrine then becomes ap-

plicable within its prescribed geographical scope as it was stated in United States v. Rands, 389 U.S. 121, 123:

> "The navigational servitude of the United States does not extend beyond the high-water mark. Consequently, when fast lands are taken by the Government, just compensation must be paid."

Thus the challenges are to the nature and location of the property used by the Government when its owners seek an exception to the application of the servitude. There appears to be no balancing of public good against private interest in these instances, but instead the issue is whether the segment or interest is within the definition and scope of the doctrine geographically as the above quotations demonstrate. Kaiser Aetna v. United States, 444 U.S. 164, is a variation on the geographical limitations of the doctrine.

The navigational servitude power has been exercised and upheld in cases where States own the bed of the stream. We have considered Montana v. United States, 450 U.S. 544, 555, and noted the statement therein that the power exists "regardless of who owns the riverbed." The other cases concerning State ownership of the riverbed are basically the same. There is nothing unusual in having the ownership of a navigable stream bed vested in an entity other than the United States, and this makes no difference in the application of the power including those situations where a State owns the riverbed. *See also* United States v. Holt State Bank, 270 U.S. 49, and United States v. Oregon, 295 U.S. 1. Since the United States may use the doctrine of navigational servitude against the States it must also be applicable against the Cherokees in this case.

The Cherokees here assert that they are a sovereign nation and the doctrine cannot be used against them. The Court considered such a position in Montana v. United States, 450 U.S. 544, 563, and referred to United States v. Wheeler, 435 U.S. 313, 323, where it was said that Indian

tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *Wheeler* also stated that the Indian tribes had lost many of the attributes of sovereignty. Again in Montana v. United States, 450 U.S. 544, 564, the Court said:

> "But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."

The Court quoted Mescalero Apache Tribe v. Jones, 411 U.S. 145, and other cases.

There would seem to be no basis by reason of the status of plaintiff to limit the application of the navigational servitude nor its consequences.

If the Indians in Montana v. United States, 450 U.S. 544, would have had title to the riverbed it would have made no difference in the application of the navigational servitude. As the Court there said, at 555:

> "As the Court of Appeals recognized, *ibid.*, and as the respondents concede, the United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who owns the riverbed. Therefore, such phrases in the 1868 treaty as 'absolute and undisturbed use and occupation' and 'no persons, except those herein designated . . . shall ever be permitted,' whatever they seem to mean literally, do not give the Indians the exclusive right to occupy all the territory within the described boundaries. Thus, even if exclusivity were the same as ownership, the treaty language establishing this 'right of exclusivity' could not have the meaning that the Court of Appeals ascribed to it."

Again the exercise of the servitude is not the taking of property but the exercise of a power to which the property owners have always been subject.

The plaintiff seems to argue that the United States somehow bargained away this power to control and improve navigation and bargained away the public nature of the Arkansas River. But again, the title elements of the several treaties were executed and the obligations merged in and were discharged by the conveyance of title to the Cherokees. There is nothing more now to add to the title to make it a "fee plus." There is no residual element in the treaties as to title. The fact that the *Choctaw* court considered history and the treaties to arrive at its conclusion and may have considered them unusual as to the title to the bed of the river does not here increase the extent or nature of the Cherokees' title which passed by the patent in 1836 as the *Choctaw* court decided. Thus the treaty rights are in the patent. The Cherokees thus on this issue are no different than would be any other entity with title to the riverbed. There is no authority and no basis for an exception to the public nature of the navigable river to create a "private river" as plaintiff urges nor to create an exception to the application of the navigational servitude because plaintiff is an Indian tribe.

There would seem to be no issue in this appeal as to the trust obligations of the United States. This matter was not considered by the trial court and there seems to be no ownership interest to be derived therefrom.

I would reverse the trial court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Misc. No. 84-8023

CHEROKEE NATION OF OKLAHOMA,
RESPONDENT,

v.

UNITED STATES OF AMERICA,
PETITIONER.

SEPTEMBER TERM—October 4, 1984

Before Honorable William H. Holloway, Jr., Chief Judge, and Honorable William E. Doyle, Circuit Judge.

This matter comes on for consideration of the petition for leave to appeal pursuant to 28 U.S.C. § 1292(b) filed in the captioned miscellaneous case.

Upon consideration whereof, it is ordered that the petition for leave to appeal is granted.

HOWARD K. PHILLIPS, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 83-306-C

CHEROKEE NATION OF OKLAHOMA,
PLAINTIFF,

v.

UNITED STATES OF AMERICA,
DEFENDANT.

Filed June 13, 1984

AMENDED
ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Both parties agreed, during a pretrial conference, that the case should be bifurcated and that the liability phase should be resolved on cross motions for summary judgment.

The legal issues facing the court are:

1. Whether the United States' navigational servitude in the Arkansas River prevents liability for an alleged fifth amendment taking of land held in fee by the Cherokee Nation?
2. Whether the exercise of a navigational servitude constituted the breach of some duty of care to plaintiff?

The parties agree there are not factual issues in dispute and submitted, in response to a court order, their motions

and supporting briefs concerning the above two issues of law. The question of damages is not addressed in this order and will be resolved at a later date.

In 1957, pursuant to the Flood Control Act of 1944, 58 Stat. 883, 890, and The River and Harbors Act of 1946, 60 Stat. 634, 636, defendant, acting through its United States Army Corps of Engineers, constructed a series of locks and dams on the Arkansas River on lands owned in fee simple by the Cherokee Nation. Defendant did not request permission from the Cherokee Nation to build said locks and dams, and did not compensate the Cherokee Nation for that activity.

Defendant asserts it is entitled to construct said locks and dams without compensating the plaintiff pursuant to its navigational servitude, a power reserved to it under the Commerce Clause of the Constitution. *See United States v. Rands*, 389 U.S. 121, 122 (1967).

In *Choctaw Nation, et al., v. United States*, 397 U.S. 620 (1970), the United States Supreme Court held that by the patent to the Cherokee Nation the United States granted fee simple title to the bed and banks of the navigable Arkansas River within the borders of the State of Oklahoma. By so holding, the Court created a unique situation by which a portion of the navigable Arkansas River is, essentially, a private waterway belonging exclusively to the Cherokee Nation. By transferring fee simple title absolute, via treaty with a sovereign Cherokee Nation, the United States government can only impose restrictions or servitudes which were reserved to it in the treaty or patent. *See Shively v. Bowlby*, 152 U.S. 1 (1894). Although the treaty did reserve limited specific easements and right of passage, it did not provide for navigational servitude. *See* Treaty of New Echota, 7 Stat. 478 (December 29, 1835).

Defendant argues that the *Choctaw Nation* case, *supra*, specifically held the applicable portion of the Arkansas River to be subject to navigational easement, citing the following language:

> Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce.

397 U.S. 620, 635.

The issue in *Choctaw Nation*, however, was ownership of the bed and banks of the river. Navigational servitude was not an issue before the court and was not briefed by the parties. Accordingly, the court's remark is merely dictum and is not controlling law in this case.

Defendant cites numerous cases which support its argument that navigational servitude is a paramount right which need not be reserved by contract or treaty. Defendant's cases, however, all deal with public navigable waterways flowing over privately-owned beds, or along privately-owned banks.

This is a unique case in which a private waterway, together with its bed and banks, is owned, not by a private person or entity, but by a sovereign nation. Defendant's cited cases are inapplicable to this situation and do not serve as precedent.

Since a navigational easement was not reserved to the United States under the treaty and patent, its actions above amount to a taking of private property and it must pay just compensation to the Cherokee Nation, the fee title owner, under the Fifth Amendment to the Constitution of the United States. *See Kaiser Aetna, et al., v. United States*, 444 U.S. 164 (1979).

Accordingly, the court grants summary judgment in favor of the plaintiff as to the issue of liability only, and denies defendant's motion for summary judgment on the same issue.

Since the court bases its decision on the grounds stated above, it does not address the second issue.

It appears to this court that the order granting summary judgment against defendant on the issue of liability involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from that order may materially advance the ultimate termination of the litigation. Accordingly, defendant has ten days to file an interlocutory appeal of this order. 28 U.S.C. § 1292(b). The action is hereby stayed during the pendency of its appeal.

IT IS SO ORDERED this 13th day of June, 1984.

Frank H. Seay
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 84-2355
(D.C. #83-306-c)

CHEROKEE NATION OF OKLAHOMA,
PLAINTIFF-APPELLEE,

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT.

NOVEMBER TERM – January 23, 1986

Before Honorable John P. Moore, Honorable Oliver Seth, Circuit Judges, and Honorable Richard P. Matsch, District Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the Eastern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

HOWARD K. PHILLIPS, Clerk

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* Of the United States District Court for the District of Colorado, sitting by designation.

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